



GOVERNOR OF MISSOURI

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July 5, 2013

TO THE SECRETARY OF STATE OF THE STATE OF MISSOURI

Herewith I return to you Senate Committee Substitute for House Committee Substitute for House Bill No. 436 entitled:

AN ACT

To repeal sections 21.750, 571.030, 571.101, 571.107, 571.117, and 590.010, RSMo, and to enact in lieu thereof fourteen new sections relating to firearms, with a penalty provision.

I disapprove of Senate Committee Substitute for House Committee Substitute for House Bill No. 436. My reasons for disapproval are as follows:

Senate Committee Substitute for House Committee Substitute for House Bill No. 436 violates the Supremacy Clause of the United States Constitution as well as an individual's free exercise of speech protected by both the federal and state constitutions.

**I. Violates the Supremacy Clause of the United States Constitution**

Senate Committee Substitute for House Committee Substitute for House Bill No. 436 violates the Constitution of the United States, Article VI, Clause 2, commonly referred to as the Supremacy Clause. A conflicts-of-law provision, the Supremacy Clause was designed to provide a mechanism to enforce federal acts and to resolve discord between state and federal laws that touch upon the same subject, giving precedence to the laws of the nation over those of the respective states.

At the time of the Constitutional Convention, the framers proposed a number of ideas to resolve conflict between state and federal law, including the Virginia Plan where Congress would have been given the direct power to "negative" or veto state laws. Ultimately, however, the Supremacy Clause was adopted – an idea derived from Alexander Hamilton's Federalist Paper No. 33 and James Madison's Federalist Paper No. 44, but proposed for inclusion in the Constitution by Anti-Federalist Luther Martin. It states:

*This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the*

*Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.*

The Supremacy Clause becomes relevant when a state law conflicts with a federal statute, or when it is impossible to comply with both state and federal law, or, as in the particular case of Senate Committee Substitute for House Committee Substitute for House Bill No. 436, when a state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Hines v. Davidowitz*, 312 U.S. 52 (1941), *see also Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000). By seeking to declare certain federal acts null and void, Senate Committee Substitute for House Committee Substitute for House Bill No. 436 seeks to turn the hierarchy of our national framework of laws on its head in clear violation of Article VI of the U.S. Constitution.

In addition, Senate Committee Substitute for House Committee Substitute for House Bill No. 436 would deprive a federal agent of his or her authority to enforce certain federal acts within the state; indeed it would make such conduct a crime. The lineage of cases prohibiting this type of legislation dates back to 1819, when Chief Justice John Marshall, writing for a unanimous U.S. Supreme Court in *McCulloch v. Maryland*, solidified the principle that the Supremacy Clause prevents states from regulating, interfering with, or controlling federal instrumentalities. 17 U.S. 316 (4 Wheat.). Decades later, in *Tennessee v. Davis*, the Court reiterated this position: “No state government can exclude [a federal agency] from the exercise of any authority conferred upon it by the Constitution . . .” (100 U.S. 257 (1879)). And, in 1890, the Court ruled that a state does not have criminal jurisdiction over a federal agent who commits an act in the performance of his official functions. *In re Neagle*, 135 U.S. 1.

Notwithstanding *McCulloch* and its progeny, states have, from time to time, attempted to resurrect the pre-Civil War concept of nullification, an argument that individual states, either through legislation or state court ruling, can decide for themselves if a federal law is constitutional, all in an effort to distance a state from the reach of Congress. Counted among such efforts is now Senate Committee Substitute for House Committee Substitute for House Bill No. 436, which seeks to not only prevent federal agents from performing their sworn duties within Missouri, but to exempt Missouri from a number of named and unnamed federal acts.

Of course, an individual state is not empowered to determine which federal laws it will comply with, nor is it empowered to declare a federal act to be unconstitutional. Under Article III of the U.S. Constitution, the authority to declare a federal act unconstitutional is within the sole province of the federal courts. *See Cohens v. Virginia*, 19 U.S. 264 (1821); *see also Cooper v. Aaron*, 358 U.S. 1 (1958). Notably, the federal acts targeted in the bill for nullification have not been deemed unconstitutional by a federal court.

The doctrine of supremacy is as logically sound as it is legally well-established. Consider how our nation’s efforts during the Second World War might have been frustrated if, following the passage of the Burke-Wadsworth Act, individual states could have exempted their citizens from selective service, or how one state’s economic prosperity might have been diminished if one or more contiguous states opted out of the Federal Highways Act of 1956, thereby making it more difficult to bring goods and services to market.

Still, nullification advocates often reference the Kentucky and Virginia Resolutions of 1798 and 1799, in which Thomas Jefferson and James Madison asserted a state's right to nullify the Alien and Sedition Acts (though the respective states chose not to assert that right). Jefferson and Madison argued that states must have the final word because the Constitution had not expressly established an ultimate authority on constitutional matters. However, a few years later in *Marbury v. Madison*, the Supreme Court unanimously held that: "It is emphatically the province and duty of the judicial department to say what the law is." 5 U.S. 137 (1803).

Nonetheless, from the 1820s throughout the 2000s, nullification attempts periodically surfaced, but consistently failed. Shortly after *McCulloch*, the Ohio legislature passed a resolution rejecting Chief Justice Marshall's ruling and then legislatively imposed a tax on the federal bank. In response, the U.S. Supreme Court, in *Osborn v. Bank of the United States*, held that Ohio's tax was "repugnant to a law of the United States . . . and therefore void." 22 U.S. (9 Wheat.) 738 (1824).

More than a century later in *Cooper v. Aaron*, the Supreme Court, relying on the Supremacy Clause, rejected attempts by the state of Arkansas to ignore its direction to desegregate schools in *Brown v. Board of Education*, stating that nullification was not "a constitutional doctrine . . . [but] illegal defiance of constitutional authority." 358 U.S. 1 (1958). At the time of the *Brown* decision, the Missouri Constitution of 1945 contained a provision that required separate schools based on race (Art. IX, Sec. 1). However, Missouri properly recognized the legal authority of the United States Supreme Court and, soon after *Brown*, Attorney General John M. Dalton declared that the State Constitution and any statutes requiring segregation were "superseded by the decision of the Supreme Court of the United States and are, therefore, unenforceable . . . ." Daugherty, B.J. & Bolton, C.C. *With all deliberate speed: Implementing Brown v. Board of Education*, 179. University of Arkansas Press, 2008. Also, the state board of education adopted a resolution stating its intent to implement *Brown*, and Governor Phil M. Donnelly joined by stating that Missouri would follow *Brown's* requirements.

Even recently, efforts to nullify federal law have continued without success. The Supreme Court of Montana, swayed by the unique character of its state, mimicked Ohio's defiance of *McCulloch* in upholding a state law that limited political contributions by corporations, despite the U.S. Supreme Court's ruling to the contrary in *Citizens United v. Federal Election Commission*. 558 U.S. 310 (2010). The U.S. Supreme Court, confronted with the question of whether *Citizens United* applied to state law, unequivocally affirmed the long-standing supremacy doctrine by stating: "There can be no serious doubt that it does." *American Trade Partnership, Inc. v. Bullock*, 132 S.Ct. 2490 (2012).

## **II. Violates the Free Exercise of Speech Protected by the State and Federal Constitutions**

Senate Committee Substitute for House Committee Substitute for House Bill No. 436 would also infringe upon an individual's freedom of speech protected by the federal and state Constitutions by making it a crime to publish the name or other information of someone who owns a firearm.

There is no shortage of unacceptable scenarios that could result from this provision. As one example, newspapers around the state annually publish photos of proud young Missourians who harvest their first turkey or deer. Under this bill, doing so would be a crime. Also, and somewhat

ironically, a reporter who prints a photo of a local rally being held in support of gun rights could face up to a year in jail or a thousand dollar fine, or both.

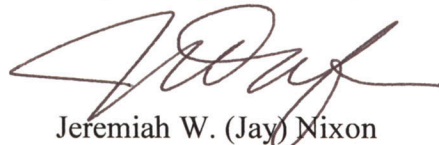
In addition, a reporter would be precluded from writing or tweeting the name of a burglary victim who had his or her firearm stolen, or even from doing a story on a candidate in an upcoming General Assembly election if that candidate owns a firearm. Presumably, a reporter could not even attach her name to any story if she is herself a gun owner. Moreover, there is nothing in the bill's broad prohibitive language that would prevent criminal charges if a firearm owner is mentioned in court records or police reports, or even by a private citizen on a social networking site. Such a list of examples is conceivably endless. That said, and putting aside the perplexing paradox of seeking to protect one constitutional right by so significantly diminishing another, curtailing speech in such a manner clearly violates the free exercise of speech protected by the state and federal constitutions.

### **Conclusion**

In light of Article VI, Clause 2, of the U.S. Constitution, the guarantee of an individual's freedom of speech contained in both the federal and state Constitutions, as well as the vast and enduring case law affirming the supremacy doctrine and invalidating the concept of nullification, it can safely be determined that Senate Committee Substitute for House Committee Substitute for House Bill No. 436 is, in multiple respects, constitutionally impermissible.

In accordance with the above stated reasons for disapproval, I am returning Senate Committee Substitute for House Committee Substitute for House Bill No. 436 without my approval.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Jay Nixon", with a stylized flourish extending from the end.

Jeremiah W. (Jay) Nixon  
Governor